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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/780,273	02/09/2001	Barrie R. Froseth	5390USA	8033
21186 7590 04/14/2008 SCHWEGMAN, LUNDBERG & WOESSNER, P.A. P.O. BOX 2938 MINNEAPOLIS, MN 55402				
EXAMINER				
THAKUR, VIREN A				
ART UNIT		PAPER NUMBER		
1794				
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

09/780,273

Applicant(s)

FROSETH ET AL.

Examiner

VIREN THAKUR

Art Unit

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 09 October 2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 128, 134, 135, 137-139 and 144-146 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 128, 134, 135, 137-139 and 144-146 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/3508)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

Response to Amendment

1. As a result of the new grounds of rejection in the Examiner's Answer Applicant has amended the claims and has requested that the prosecution be reopened. The response filed October 10, 2007 has been entered and the finality of the Office Action, mailed August 15, 2006 has been withdrawn. Also, the Advisory Action, filed November 27, 2007 has been withdrawn in order to introduce the following new grounds for rejection.

2. As a result of the amendment to the claims, the rejection of claim 128 under 35 U.S.C. 102(b) as being anticipated by Callahan et al. (US 2802599) has been withdrawn. Similarly, the rejection of claim 128 under 35 U.S.C. 102(e) as being anticipated by Olander Jr. et al. (US 5997924) has been withdrawn.

Claim Rejections - 35 USC § 103

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

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4. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

5. **Claims 128, 134 and 144 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ezzat (GB 2250266) in view of Katz (US 3851574), GoogleGroups (12/8/1999), Daedkindt et al. (EP 335852), Belleson et al. (US 4751090) GoogleGroups (6/16/1999), GoogleGroups (01/21/2000), GoogleGroups(01/22/2000), GoogleGroups (01/19/2001) and International Food Information Council (IFIC - 1998), Brown et al. (US 6618062) and Bebiak et al. (US 6358546),**

Regarding claims 128, Ezzat teaches unpopped popcorn kernels, a flavoring ingredient, an additive and a microwave package which are selected by the consumer which requires further finishing by the consumer in order to pop the popcorn with microwaves (See page 1, line 33 to page 2, line 23). Claims 128, 135 and 138 differ specifically reciting using sucralose as the particular sweetening additive.

Nevertheless, Katz has been relied on to teach using sweeteners in combination with alternative sweeteners that have an equivalent sweetness to sucrose for the purpose of coating the unpopped kernels with a sweetening carbohydrate film former (column 3, lines 23-35 and column 3, line 66 to column 4, line 9). Google Groups

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teaches that sucralose has been a known sweetener used to flavor popcorn (see Page 3 of 7). Also, Google Groups teaches alternative sweeteners used for dietary purposes such as for low calorie diets. Daedkindt et al. also teaches that sucralose has been a known alternative sweetener which has been used for reduced calorie diets (See English Abstract). Therefore, Daedkindt et al., GoogleGroups and Katz teach that it has been well known to combine alternative sweeteners for the purpose of flavoring popcorn products and for diet conscious consumers. Therefore, to specifically use sucralose would have been an obvious matter of choice for the purpose of achieving a particular flavor to the food product. Additionally, Belleson et al. has been relied on to teach a sugar phase comprising a plurality of sweetening components (column 2, lines 39-41), wherein microwaving until a burned flavor has been reached is minimized (column 3, lines 3-34 and lines 51-54). IFIC teach how much sucralose should be substituted for sucrose in a cooking application, while GoogleGroups (06/16/1999), GoogleGroups (1/21/2000), GoogleGroups (01/22/2000) and GoogleGroups (01/19/2001) teach that sucralose does not caramelize like conventional sugar, thus overcoming the burning taste of microwave popcorn composition caused by caramelization of sugar. Therefore, based on these teachings there would have been a reasonable expectation of success of using sucralose in packaged unpopped microwave popcorn kernels which prevented the burning of the sugar.

Claim 128 further differs from the combination of the prior art in reciting wherein the food product is a customized food product wherein the ingredients are selected by the consumer. As noted in the Examiner's Answer, mailed on August 9, 2007 and in the

Final Rejection, mailed August 15, 2006, since the prior art is marketing packaged flavored unpopped popcorn kernels, by selecting a particular brand or a particular flavor or selecting a packaged product with the particular desired ingredients, the consumer is selecting a customized food product. As taught by Google Groups, for instance, it has been well known in the art to use alternative sweeteners for dietary purposes. Therefore to choose a packaged popcorn product that includes an alternative sweetener as opposed to sugar reads on ingredients selected by the consumer. After the consumer would select the package, the consumer would have to microwave or further finish the food prior to eating.

In any case, Brown et al. has been relied on to teach allowing consumers to customize a food product over the Internet from vendors to maximize customer satisfaction and to allow customers to customize a food product based on dietary requirements (Column 1, line 15 to Column 2, line 40). Bebiak et al. teach the conventionality of customizing prepackaged food products for the purpose of tailoring a packaged product to correspond to particular dietary requirements (Column 1, lines 39-62, column 2, line 56 to column 3, line 5).

Therefore, it would have been obvious to modify the method of Ezzat to allow the consumer to customize the product using the internet prior to enclosing the popcorn snack, because Brown et al. teach having a customer to customize a food product via the Internet would assure that the vendor would maximize a customer's satisfaction and allow the customer to customize based on individual dietary requirements. Bebiak et al.

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additionally teaches that it has been conventional to customize pre-packaged food products via the Internet to meet individual dietary requirements

Claim 134 differs from the prior art combination in specifically reciting where the food product further comprises Acesulfame K, in addition to sucralose.

The combination discussed above teaches using sugar substitutes. Daekindt et al. also teach sugar substitutes including sucralose, but further include acesulfame K. Daenkindt et al. teach adding the mixture comprising saccharose, sucralose and acesulfame K has the same sweetening power as saccharose per unit volume, but because some of the saccharose has been substituted with sucralose and acesulfame K, the sugar provides a reduced caloric value (See English Abstract, Page 2). Therefore, Daekindt et al. teach that it has been conventional to combine sucralose and acesulfame K for the purpose of achieving a particular sweetness while also accommodating a reduced calorie diets by using a sweetener that has a reduced caloric value. Therefore it would have been obvious to further modify Ezzat and include acesulfame K since Daenkindt et al. teach that sucralose and acesulfame K provides, in combination, the same sweetness per unit volume of saccharose, at a reduced calorie level.

Regarding claim 144, Ezzat teaches using salt (page 2, line 7) and Katz also teaches using a sweetener as well as salt (See Example 1, Caramel Corn on column 5).

6. Claims 135, 138, 145 and 146 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ezzat (GB 2250266) in view of Katz (US 3851574), Google

Groups and Daedkindt et al. (EP 335852), Belleson et al. (US 4751090) GoogleGroups (6/16/1999), GoogleGroups (01/21/2000), GoogleGroups(01/2/2000), GoogleGroups (01/19/2001) and International Food Information Council (IFIC - 1998for the reasons given with respect to the rejection of claims 128, 134 and 144 above.

With respect to claims 135 and 138, it is noted that the claims do not recite any customization but merely recite a packaged popcorn product which includes both sucralose and acesulfame K.

Response to Arguments

7. On page 5 of the response, Applicant asserts that no selection process is performed by the consumer in determining what ingredients, flavorings and additives went into the package or what type of package is utilized. It is noted however, that claim 128 only recites wherein the food ingredient, the flavoring and the additive are selected by the consumer. It is noted that the features upon which applicant relies are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993). Therefore, by selecting a package which comprises particular components that appeal to the consumer, the consumer would have been selecting the food ingredient, flavoring and additive.

8. On page 6, Applicant asserts that "nowhere do the applied references refer to a microwave packaging wherein microwaves are used to pop the popcorn and, in the process, the sucralose is heated. This argument is moot in view of the new grounds for rejection above. It is noted that the additional references recognized the problem of burning of the sugar coated unpopped kernels when microwaving. The additional references also teach that sucralose does not caramelize like conventional sugar and thus provides a reasonable expectation of success, since sucralose will not caramelize and cause the burned taste. Additionally, IFIC provides a reasonable expectation of success for making such a substitution since sucralose is described as a suitable replacement for sucrose in cooking recipes. Therefore that the time the present invention was made, the art taught that it was conventional to use sucralose in microwave heating with a reasonable expectation of success.

9. Further on pages 6 and 7, Applicant asserts that GoogleGroups (12/8/1999) teaches away from applying sucralose to popcorn prior to popping the popcorn because it specifically teaches adding the sucralose after the popcorn is popped. This argument has been fully considered but is not deemed persuasive. It is noted that GoogleGroups (12/8/1999) has been relied on to teach the conventionality of sucralose as an alternative sweetener for diet conscious consumers. The additional references applied above address the fact that sucralose does not caramelize and burn as readily as sugar, thus preventing burning of the sugar coating when unpopped sugar coated kernels are heated in a microwave.

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Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to VIREN THAKUR whose telephone number is (571)272-6694. The examiner can normally be reached on Monday through Friday from 8:00 am - 4:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571)272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/V. T./

Examiner, Art Unit 1794

/Steve Weinstein/

Primary Examiner, Art Unit 1794